Supreme Court of the United States

OCTOBER TERM, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

against

GERTRUDE ESTIN,

Respondent.

PETITIONER'S REPLY BRIEF

JAMES G. PURDY,
ABRAHAM J. NYDICK,
of Counsel.

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Cases Cited

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Answering Point I of Respondent's Brief

It is true that alimony provisions of a separation decree are included therein as a result of statutory authority.

We pointed out on Point IV of our brief that these provisions are procedural remedies provided by statute ancillary to the decree (p. 11) Counsel for Respondent admits this (p. 14, Respt's Brief).

On page 14, Respondent refers to the stipulation of the parties, subject to the approval of the Court, as to the amount of alimony to be included in the separation decree, and says that the "common law obligations of her husband" do not create her right to alimony here.

No authority is cited because the able Counsel for the Respondent could find none.

See our discussion of this question on Point IX of our main Brief.

Answering Point II of Respondent's Brief

This point relates solely to the New York practice respecting modification of its separation decrees. The New York Courts in their judgments here under review have nowhere even hinted that our procedure in opposing Mrs. Estin's motion for a money judgment was defective. We followed the practice established by Section 1170 of the Civil Practice Act (quoted on p. 14 of our main Brief).

The New York Courts having held our procedure correct, it is obvious that this Court is not concerned therewith, unless that procedure violated some constitutional right of Mrs. Estin. There is and can be no such claim here.

Counsel for Respondent is in error when he says that the alimony in her New York decree was "fixed by the parties' separation agreement," hence untouchable.

We have demonstrated the fallacy of this argument on page 38, 39 of our main Brief. It is difficult to understand the magic by which a stipulation "subject to the approval of the court" can be transformed into a "separation agreement."

Obviously, the New York Court had power to accept or reject any portion or all of the stipulation. It actually rejected all but that which recommended the amount of alimony Mrs. Estin would receive if successful. Had the Court desired, it could have required proof of Mr. Estin's income and assets and then have fixed another sum as proper.

Had Mrs. Estin failed to satisfy the Court that she was entitled to a separation decree, it is also obvious that no alimony could have been awarded her. (Point IV, our main Brief, p. 11.)

In such an event there was nothing in the stipulation which gave her any right to collect $180 a month from Mr. Estin.

The stipulation is just what it says it is, a stipulation subject to the approval of the Court and nothing more.

The cases cited on pages 16 to 18 on Respondent's brief do not uphold Respondent's argument that this stipulation was a "separation agreement."

Atkins v. *Atkins,* 326 U. S. 683, cited on page 18, reversed a separation decree obtained by the wife in Illinois with instructions "to re-examine the case "in the light of *Williams* v. *North Carolina* and *Esenwein* v. *Commonwealth ex rel. Esenwein*" and other cases. There Mr. Atkins had obtained a divorce in Nevada which had been disregarded by the Illinois courts when pleaded as a defense to the separation action.

Griffin v. *Griffin,* 327 U. S. 220, also cited on page 18, arose on certiorari to the Court of Appeals of the District of Columbia, which had granted a judgment for Mrs. Griffin upon a New York judgment for arrears of alimony under a separation decree. That New York judgment had been entered without notice to Mr. Griffin. This Court recognized that the New York statutes gave Mr. Griffin the right to oppose a money judgment for those arrears.

Mr. Justice Rutledge in his opinion (dissenting in part) said:

> "Although this Court held in Sistare v. Sistare, 218 U. S. 1, that under New York law accrued instalments of alimony could not be modified, this is no longer the case in New York" citing cases.

An order had been made in 1936 in the New York action finding that Mr. Griffin was actually indebted for arrears up to October 1935, in a certain sum, and this

was an adjudication which this Court recognized. But the Court held to the contrary as to the subsequent arrears. This led to a reversal of the judgment.

This case recognizes the validity of our argument on Point V of our main Brief (p. 13).

Answering Point III of Respondent's Brief

On this point Respondent relies on three cases,

Durlacher v. *Durlacher,* discussed on pages 35 and 36 of our main Brief;

Bassett v. *Bassett,* discussed on pages 36 and 37 of our main Brief; and

Barber v. *Barber,* 323 U. S. 77, in support of her claim that Mr. Estin's divorce decree in Nevada had no effect on the alimony awarded Mrs. Estin in her separation decree.

Respondent says on page 29 of her Brief, that "The *Durlacher* and *Bassett* cases are parallel with the instant Estin Case" and on page 30, that in *Barber* v. *Barber,* 323 U. S. 77, "identical facts and circumstances were in issue."

These are clearly erroneous conclusions. We have already shown that the *Bassett* and *Durlacher* cases related to questions of practice not present here (See page 27 of our main Brief).

The *Barber* case considered one issue only, to wit:

Was a money judgment entered by a North Carolina Court for unpaid alimony in a separation decree made in that state, subject to modification by the Court and thus not a judgment upon which suit could be maintained in another state. Suit on this judgment was instituted in the Tennessee Chancery Court, and Mr. Barber interposed as a defense that the judgment was not final. The

Chancery Court held that the judgment was final. The Supreme Court of Tennessee held it was not final, and this Court held that it was final. No divorce decree was involved.

On page 28 of his Brief, Counsel for the Respondent says, referring to the *Durlacher* and *Bassett* cases

> "It appears, conclusively, that Simon Durlacher and William I. Bassett, both of them, opposed their wives Orders to Show Cause for money judgments, respectively."

This is clearly an erroneous statement. On page 27 of that Brief, he quotes from the opinion in the *Bassett* case in part as follows:

> "In those proceedings (the return of the order to show cause) William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do."

Mr. Durlacher appeared specially in his case (173 N. Y. Misc. 329) to contest the jurisdiction of the New York Court. From the opinion in 35 Fed. Sup. it appears that he also appeared specially on a second motion and defaulted on a third.

The cases here cited on Respondent's Brief are no authority supporting her claim.

Answering Point IV of Respondent's Brief

The statement of law at the head of this Point is correct.

Mr. Estin's wife, Mrs. Estin, had a common law right to be supported by him, a right which the New York statutes provided might be enforced by an alimony provision in her separation decree.

As Mr. Estin's wife, obviously, she was entitled to that support as long as she remained his wife, unless she forfeited that right by her own actions. And she could not be deprived of that right except by due process of law. The divorce obtained by Mr. Estin in Nevada was due process of law, and was recognized as such by the New York courts.

The erroneous conclusions drawn by Respondent's counsel from the cases cited on page 31 is clearly demonstrated by the authorities cited on Point V of our main Brief, and by the case of *Griffin* v. *Griffin*, 327 U. S. 220, cited by Respondent on page 18 of her Brief.

A wife's right to support by her husband is clearly a personal right, one based upon the marital relationship.

By no principle of law can it be held that that personal right is changed if the wife gets a separation decree which includes a provision for her maintenance.

In *Atherton* v. *Atherton*, 181 U. S. 162, the method of service of process in the Kentucky divorce action upon the wife in New York was the same as here, Mrs. Atherton, like Mrs. Estin, did not appear in the action. This Court held that Mr. Atherton's divorce decree was valid, and that it was a complete defense to Mrs. Atherton's later action for separation and alimony.

Mrs. Atherton's personal right to support was ended by the divorce decree, notwithstanding the Kentucky Court had no jurisdiction over her person.

Mrs. Estin's separation decree did not create for her any additional right to support from Mr. Estin. As we have shown, the alimony provision of that decree simply made more enforceable Mr. Estin's duty to support her.

Atherton v. *Atherton*, held that Mrs. Atherton's right to support from her husband ended with the divorce, for in reversing her judgment for a divorce from bed and

board and for alimony, there was no reservation to Mrs. Atherton of a claim for support.

We can find no legal principle upon which it may be said that Mrs. Estin's personal right to support from her husband was not ended by Mr. Estin's divorce decree simply because that right had been made more easily enforceable by a provision for alimony ancillary to her separation decree.

We believe that there is less reason to invoke a different ruling here than that applied in the *Atherton* case than there was to differentiate the basic principle in *Haddock* v. *Haddock* from that in *Atherton* v. *Atherton* when the *Haddock* case was overruled in *Williams* v. *North Carolina*.

Answering Point V of Respondent's Brief

On this point, respondent advances an argument ignored by the New York Court of Appeals in its opinion herein. She urges that the stipulation "subject to the approval of the Court" is not such but is a "separation agreement," and elaborates here the argument she makes on Point II of her brief, p. 16.

The argument on this point relates to that portion of the stipulation by which Mr. Estin appointed his then attorney "as his agent and attorney in fact to receive the service of any such process of paper", etc. Whether Mr. Estin could or could not cancel this appointment is immaterial to the Constitutional question presented by this record.

It is obvious that the stipulation speaks for itself and its construction is a matter of law. A finding by a Referee that it is a separation agreement does not make it such when, by its very terms, it is something else.

Counsel for respondent clearly draws upon imagination when he says that the language of Chief Judge Loughran,

quoted at the bottom of page 36 and top of page 37 of his brief, is applicable only if that paper is a contract.

The opinion of the New York Court of Appeals is directed to the alimony provision of the separation decree and is not applicable to a "separation agreement."

This is too clear for argument, for Chief Judge Loughran, in his opinion (R. 97), said:

> "She was awarded permanent alimony of $180 a month —an amount that *had been recommended in a stipulation* filed with the Court * * *." (Italics ours.)

Such plain language cannot be ignored.

Answering Point VI of Respondent's Brief

The Court of Appeals in its opinion held squarely to the contrary (R. 98, 99). Chief Judge Loughran, in his opinion, said:

> "Although in this New York separation action, the husband was adjudged to have been solely to blame when he abandoned the wife in April, 1942, yet the Nevada Court was not thereby disabled from granting him an absolute divorce in May, 1945, upon the ground of his having then lived apart from the wife for a period of three years without cohabitation."

No case cited by counsel for respondent on Point VI is inconsistent with so much of the decision of the New York Court of Appeals as holds that the Nevada Court had power to make the divorce decree at Mr. Estin's suit, notwithstanding the New York separation decree.

The Nevada Courts have also held that a separation decree such as Mrs. Estin has is no defense to an action for divorce in Nevada based upon the statute permitting such an action where the husband and wife have lived apart for five (now three) years without cohabitation.

George v. *George*, 56 Nev. 12.

The issues in the New York separation action here were not those in the Nevada action. In this action the issue was, did Mr. Estin desert Mrs. Estin. In the Nevada action the issue was, had the parties lived apart without cohabitation for three years.

On page 45 respondent cites *Vickers* v. *Vickers*, 45 Nev. 274, but the analysis on that page is misleading.

There were two appeals. In 45 Nev. 274, the Court considered a defense which had been pleaded in the divorce action. This defense pleaded as *res judicata* that the issues presented by the pleadings had been previously decided against the plaintiff in a West Virginia Court. Those facts were admitted by the reply, and the Court held that the plaintiff was bound by a former judgment.

In the decision in 45 Nev. 288, 202 Pac. 31, a different question in the same case was considered. The Court said (p. 295):

> "The mere fact that an issue has been once adjudicated does not oust the same or any other Court of jurisdiction to hear and determine it again. This is elementary. In the Code states the defense of former adjudication is new matter, which must be pleaded if an opportunity is afforded to do so, * * * and if this is not done the Court has jurisdiction to enter a binding judgment thereon—one that will not be open to attack by way of a motion to set it aside on the ground of former adjudication, for want of jurisdiction to enter it."

That a plea of *res judicata* in and of itself does not oust the Court of jurisdiction, see:

> *Hollenbeck* v. *Aetna Casualty & Surety Co.*, 215 A. D. 609; 214 N. Y. S. 402, aff'd 243 N. Y. 540;
> *Baird* v. *Superior Court in and for City and County of San Francisco*, 26 P. 640, 204 Cal. 408;

Svalins v. *Saravanna,* 173 N. E. 281; 341 Ill. 236, 87 A. L. R. 821;
Fiannacco v. *Booth & Co.,* 39 F. (2d) 639 (D. C., N. Y.), aff'd 46 F. (2d) 1014;
Pfeffer v. *Corey,* 211 Iowa 203, 233 N. W. 126;
Wollard v. *Home State Bank,* 121 Kan. 474; 247 P. 868, cert. denied 273 U. S. 674;
Massilon Savings & Loan Co. v. *Imperial Finance Co.,* 114 Ohio St. 523, 151 N. E. 645.

These decisions make clear this proposition of law.

A former adjudication by another Court in another state, does not oust the second Court from jurisdiction over the matter. The judgment of the first Court must be pleaded and proven in the second Court, otherwise the latter Court may make a judgment which must be given full faith and credit under the Constitution.

Hence the plaintiff here, if she believed that her separation decree was a valid defense to Mr. Estin's suit for a divorce in Nevada, was under an obligation to affirmatively plead and prove that decree in the Nevada suit. She elected not to do so. Hence she permitted the Nevada Court to act on her default in appearing or pleading, resulting in a decree of divorce which the Nevada Court had jurisdiction to make. She is bound by that decree just as firmly as were the defendants in the *Bassett* and *Durlacher* cases, considered on pages 35 to 37 of petitioner's brief.

Barber v. *Barber,* 21 Howard 582, has been discussed on pages 26 and 27 of our main brief.

Harding v. *Harding,* 198 U. S. 317, quoted on page 46 of respondent's brief, is obviously not in point. Mrs. Harding there did just what Mrs. Estin here did not do. She appeared and contested her husband's divorce action. She did not permit the decree to go against her by default.

We fail to see the slightest effect that *Atherton* v. *Atherton,* 181 U. S. 155, has in sustaining respondent's argu-

ment on this point. There Mr. Atherton obtained a divorce in his home state of Kentucky against his wife then living in New York, who was not served in the Kentucky action and did not appear therein.

This Court in *Williams* v. *North Carolina,* first appeal, held that the principle of *Atherton* v. *Atherton* was inconsistent with *Haddock* v. *Haddock,* 201 U. S. 562, and overruled that latter case.

In no case cited by the respondent has it been held that a defendant who has permitted a judgment by default against him by a Court having jurisdiction of the subject matter may contest the merits of that judgment in another jurisdiction.

If the Nevada Court had made a mistake of law in deciding what effect to give Mrs. Estin's separation decree, that error could not be raised by her collaterally. A judgment cannot be impeached either in or out of the state by showing that it was based on a mistake of law.

American Express Co. v. *Mullin,* 212 U. S. 312, 29 S. Ct. 381;
Indemnity Ins. Co. of N. A. v. *Smoot,* 152 F. (2d) 667; 80 U. S. App. D. C. 278; cert. denied 66 S. Ct. 981;
Phillips v. *Griffen,* 259 N. Y. S. 102, 236 A. D. 209.

As the Nevada Court had jurisdiction over Mr. Estin, any error of law that Court made could be corrected only by an appeal to the Nevade Appellate Courts and then to this Court.

Bassett v. *Bassett* (*supra*);
Durlacher v. *Durlacher* (*supra*).

Answering Point VII of Respondent's Brief

That which may be public policy in New York is not necessarily public policy in Rhode Island, California, Nevada, or any of the other states.

The "Public Policy" of New York received a shock from the decision of this Court in *Williams* v. *North Carolina* (first appeal) for which it is still trying to find a remedy. (*Russo* v. *Russo,* 62 N. Y. Sup. (2d) 514, quoted at page 18 of our main brief.)

The cases of *Gray* v. *Gray,* 61 Fed. Supp. 397, cited on page 49 of respondent's brief, and *Security Trust Co. of Rochester* v. *Woodward,* 73 Fed. Supp. 667, and those cited on page 55, are simply illustrative of the divergent opinions held by the Courts of the various states as to the extent that a valid divorce decree affects the parties. We note that the latter case was decided largely upon the authority of the Court of Appeals' decision in this case and was affirmed by the Circuit Court of Appeals also on the authority of *Esenwein* v. *Esenwein,* 325 U. S. 279, and *Bassett* v. *Bassett,* 141 Fed. (2d) 954.

It is obvious that neither of the last cited cases support the judgment except the minority opinion in the *Esenwein* case. The decision is contrary to the opinion of the majority of this Court in that case.

Of the cases cited on page 54, *Bennett* v. *Tomlinson* and *Miller* v. *Miller,* Iowa cases, were decided years before this Court decided *Williams* v. *North Carolina.*

Respondent's answer on page 56 to our hypothetical case is interesting. He would compel Mr. A. to leave his home state and go nearly 3,000 miles to the state of domicile of his adulterous wife to sue for a divorce because of her conduct.

But suppose in the meantime she has become domiciled in South Carolina, where no divorces are granted?

Under the doctrine of *Estin* v. *Estin,* Mr. A., although possessed of a valid divorce in Arizona, must continue to pay to his adulterous ex-wife as long as she lives alimony awarded by her New York separation decree.

On page 57 respondent urges that if the judgment here is reversed, "thousands of men all across the country" will use the judgment of this Court as an easy method of terminating their liability to pay their wives the alimony theretofore awarded them by separation decrees.

This argument is clearly specious. It assumes that a wife is helpless if she is obliged to defend her husband's action begun in a state other than her own.

The courts of each state are vigilant to protect the rights of a wife who appeals to it for protection. Specimen cases are *Harding* v. *Harding,* 198 U. S. 317, arising in California, cited several times on respondent's brief, and *Vickers* v. *Vickers,* 45 Nev. 274 (see p. 45, Respondent's Brief).

Mrs. Estin had full opportunity to appear in Mr. Estin's divorce action in Nevada; under §9465 of the Nevada General Laws, she would have been entitled to an order requiring Mr. Estin to pay such sums as may be necessary "to enable the wife to * * * defend such suit and for her support." It would be reversible error for the Court to refuse.

Drespel v. *Drespel,* 56 Nev. 366.

This right includes the expenses of an appeal.

Lamb v. *Lamb,* 55 Nev. 437.

The Court had full power to grant her proper permanent alimony (§9463).

Briefly, the Courts of Nevada are as zealous to protect the rights of a wife who seeks to have her rights protected as are the Courts of New York or of any other state.

Every American is a citizen not only of some particular state, but of the United States. Each has a constitutional right to travel between the several states or obtain a new domicile in any of them, at his or her pleasure. We have 48 states, the District of Columbia, and territories, each with its own laws governing divorce. With over 50 such independent laws, it is manifestly impossible to prevent inconvenience in individual cases. The utmost that can be done is to afford an opportunity to any spouse to oppose the other's suit wherever started. It is no more a hardship for a wife in New York to contest her husband's suit in Nevada for a divorce based on one's year's willful desertion (Nev. G. L. 9460, subd. Third) than it would for a husband in Nevada to contest an action for a divorce brought in New York upon an unfounded claim of adultery.

The laws of both states require that each wife be furnished with funds by her husband to defend herself.

Any state that did not do so would soon meet with a stern rebuke from this Court.

These cases cannot be decided on sympathy for either a husband or for a wife in each particular case. They must be decided on the fundamental principles of law governing the obligation of a husband to support his wife.

We cannot say that our mythical Mr. A is relieved from paying alimony to his divorced adulterous ex-wife by his divorce decree, but that Mr. Estin is not relieved from paying alimony to Mrs. Estin by his divorce decree, and visa versa.

The doors of the Nevada Courts were open to her, the Nevada laws required that those Courts see that she was furnished with funds by her husband for her defense. She refused to exercise those rights.

CONCLUSION

The judgment should be reversed as prayed for on our main brief.

JAMES G. PURDY,
ABRAHAM J. NYDICK,
of Counsel.